



January 29, 2014

John Heggeness
Nevada Division of Environmental Protection
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Re: Comments of The Nevada Mining Association on the Draft Nevada 2012 Integrated Report

Dear Mr. Heggeness:

The Nevada Mining Association ("NvMA") respectfully submits the following comments on the Nevada Division of Environmental Protection's ("NDEP") Draft 2012 Integrated Report ("Draft IR"). NvMA applauds NDEP's efforts in compiling the Draft IR, but, as the trade association for Nevada's mining industry, NvMA is concerned that the Draft IR inappropriately includes many dry streambeds and ephemeral waters that do not meet the criteria for Clean Water Act ("CWA") jurisdiction in the submissions to EPA required by CWA sections 305 and 303(d). 33 U.S.C. §§ 1313(d) and 1315. NvMA is concerned that the inclusion of non-jurisdictional waters in the submissions to EPA under CWA sections 305 and 303(d) is not only a poor policy decision, but also exceeds NDEP's statutory authority.

I. Nevada Is Not Required to Include Non-Jurisdictional Waters In Its Submissions To EPA Under CWA Sections 305 and 303(d).

The CWA requires each state to submit, biennially, to EPA a "description of the water quality of all navigable waters in such State during the preceding year ..." and to identify among those waters, waters "for which effluent limitations are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. §§ 1313(d)(1)(a). The CWA only requires states to submit the information required by sections 303(d) and 305 for waters that meet the CWA definition of "waters of the United States." *See Id.* at § 1362(7).

First, the waters required to be included in a state's submission under CWA section 305 are expressly limited to "navigable waters" which are defined by the CWA as the "waters of the United States." 33 U.S.C. § 1362(7). Second, although not expressly stated as in section 305, the waters to be included in a state's 303(d) submission are also limited to navigable waters. CWA section 303(d) requires states to identify those waters for which "effluent limitations ... are not stringent enough to meet any water quality standard applicable to such waters." *Id.* at 1313(d)(1)(a). Also, the CWA only provides for the promulgation of effluent limitations and water quality standards for navigable waters. *See id.* at 1311(a) and 1313(a)(2)(A). Therefore, the 303(d) list need only include navigable waters to comply with the CWA.

The definition of navigable waters for purposes of the CWA is broader than what has traditionally been considered “navigable” waters and includes non-navigable waters so long as the non-navigable water has a sufficient connection to a navigable-in-fact water. *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, a majority of the Court could not agree on a single test to determine whether a water was navigable for CWA purposes and Justices Scalia and Kennedy both offered an analysis of how much of a connection to a navigable-in-fact water is required to support jurisdiction under the CWA. The analysis set forth by Justice Scalia requires a “continuous surface connection” to a traditional navigable-in-fact water for CWA jurisdiction to attach. Justice Kennedy’s analysis, however, does not require a continuous surface connection and makes a water subject to CWA jurisdiction if it has a “significant nexus” to a traditional navigable-in-fact water. *See id.* at 757 and 87. Under either approach, waters that exhibit no hydrologic connection to a navigable-in-fact water are not navigable for purposes of CWA jurisdiction. Accordingly, the Draft IR – which will become Nevada’s submission to EPA under CWA sections 305 and 303(d) – need not include waters that exhibit no hydrologic connection to a traditional navigable-in-fact water.

I. Including Non-Jurisdictional Waters in Nevada’s Submissions To EPA Under CWA Sections 305 and 303(d) Creates Regulatory Uncertainty and Is A Poor Policy Decision.

NDEP has included many dry streambeds and ephemeral waters that do not exhibit any hydrologic connection to a traditional navigable in fact water in the Draft IR. Although EPA has indicated that over-inclusiveness will generally not be considered grounds for disapproving a state’s 305 and 303(d) submissions, sound policy reasons support limiting Nevada’s submissions to only those waters required to be included by the CWA. *See EPA, Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List Submissions* (May 20, 2002). The inclusion of non-jurisdictional waters has no apparent benefit to Nevada and bears a substantial risk of creating regulatory uncertainty and confusion among regulators, regulated entities, and the public.

The Draft IR clearly states that the primary purpose of the Integrated Report is compliance with CWA sections 303(d) and 305, and notes that it is developed for “use by the public, other entities, and for NDEP water quality management planning purposes.” *See* Draft IR at 1. By including non-jurisdictional waters, which the CWA does not require be included, in a document designed to comply with CWA requirements, NDEP creates the perception that these waters are subject to CWA regulation when, in fact, they are not. If it is perceived that these waters are subject to CWA regulation, there will be unwarranted confusion regarding their regulatory status and the actions NDEP is required to take regarding these waters.

The risk of confusion is amplified with the inclusions of non-jurisdictional waters in the 303(d) list of impaired waters. This list is intended to identify those waters for which Nevada is required to promulgate total maximum daily loads (TMDLs). However, the CWA does not provide for TMDLs to be promulgated for non-jurisdictional waters and the inclusion of such waters on the 303(d) list creates unwarranted confusion regarding the TMDL process and Nevada’s progress in promulgating required TMDLs. This confusion is unjustified – the inclusion of non-jurisdictional waters in its submissions to EPA in no way advances Nevada’s

independent role in protecting waters of the state not subject to the CWA. Accordingly, NvMA requests that NDEP recognize that the risk of inclusion is outweighed by any perceived benefit and not include non-jurisdictional waters in its submissions to EPA under CWA sections 303(d) and 305.

II. Including Non-Jurisdictional Water In Nevada's Submissions To EPA Under CWA Sections 305 and 303(d) Exceeds NDEP Statutory Grant of Authority.

NDEP's authority to act is limited, as the authority of any state agency is limited, to those actions explicitly or implicitly authorized by the legislature. *See Stockmeier v. State*, 255 P.3d 209, 212 (Nev. 2011). No provision of Nevada's statutes explicitly authorizes or directs NDEP to make the submissions to EPA required by sections 305 and 303(d). However, several provisions of Nevada's statutes implicitly authorize NDEP to make the submissions required by 305 and 303(d), but do not empower NDEP to include waters not required to be included in the 305 and 303(d) submissions.

By statute, the Director of the Department of Natural Resources is "[d]esignated as the state water pollution control agency for this state for all purposes of federal water pollution control legislation." NRS § 445A.440. The Director of the Department, or his designee, is granted the authority to "[a]dvise, consult and cooperate with other agencies of the State, the Federal Government, other states, interstate agencies and with other persons in furthering the purposes of NRS 445A.300 to 445A.730" and to "[t]ake the steps necessary to qualify for, accept and administer loans and grants from the Federal Government and from other sources, public or private, for carrying out any functions under NRS 445A.300 to 445A.730, inclusive." NRS § 445A.450(2) and (3). Making the submissions required by 305 and 303(d) is "cooperating" with the Federal Government and is a prerequisite to a state receiving federal funding for the improvement or maintenance of water quality. Accordingly, these provisions authorize NDEP to make the submissions required by 305 and 303(d).

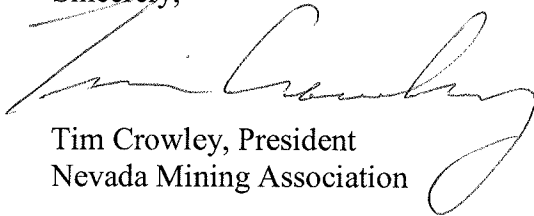
However, these provisions do not clearly authorize NDEP to make over-inclusive submissions to EPA. First, while making the submissions required by 305 and 303(d) qualifies as cooperating with EPA, being authorized to advise consult and cooperate with EPA does not mean that NDEP is authorized to provide EPA with more information than EPA requires be provided. Second, although making the submissions to EPA required by CWA sections 305 and 303(d) is a prerequisite for receiving federal funds, NRS § 445A.450(3) only authorizes NDEP to take steps "necessary" to secure such federal funding. Over-inclusiveness is not "necessary" to secure federal funding and NRS § 445A.450(3) cannot be read as implicitly authorizing such over-inclusiveness.

Nevada law also contains a catch-all provision that authorizes NDEP to "[e]xercise all incidental powers necessary to carry out the purposes of NRS 445A.300 to 445A.730" which are described as "maintain[ing] the quality of the waters of the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of

existing industries, the pursuit of agriculture, and the economic development of the state.” NRS § 445A.300 and 450(9). While this statutory provision provides NDEP broad authority, the scope of that authority is not limitless – NDEP’s action must be “necessary” to maintain the quality of the waters of the state. The over-inclusion of non-jurisdictional waters is simply not a necessary action and is not authorized by statute.

For the reasons set forth above, NvMA respectfully requests that NDEP revise the Draft IR and remove all non-jurisdictional waters from the submissions to EPA required by CWA sections 305 and 303(d). The inclusion of such waters is not required, is a poor policy decision, and is beyond NDEP’s statutory grant of authority. NvMA appreciates the opportunity to provide these comments and looks forward to working with NDEP to address the issues raised herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Crowley', is written over the typed name and title.

Tim Crowley, President
Nevada Mining Association